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In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION AND JAMES B. EDWARDS, SECRETARY OF ENERGY, APPELLANTS

v.

THE STATE OF MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE APPELLANTS

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QUESTION PRESENTED

Titles I and III of the Public Utility Regulatory Policies Act of 1978 require state regulatory authorities to consider the adoption and implementation of certain rate design and regulatory standards for electric and natural gas utilities. Section 210 of the Act requires state regulatory authorities to implement rules promulgated by the Federal Energy Regulatory Commission under which regulated electric utilities must offer to sell electricity to and purchase electricity from qualifying cogeneration and small power production facilities.

The question presented in this case is whether these statutory provisions are within Congress' power to regulate interstate commerce and are consistent with the principle of state sovereignty embodied in the Tenth Amendment.*

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* In addition to the State of Mississippi, the Mississippi Public Service Commission was a plaintiff below and the Mississippi Power and Light Company participated as an intervenor in support of the plaintiffs.

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BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the district court (J.S. App. 1a-7a) is not reported.

JURISDICTION

The final judgment of the district court (J.S. App. 8a-9a) was entered on February 27, 1981. The Federal Energy Regulatory Commission and the Secretary of Energy filed a joint notice of appeal to this Court on March 13, 1981 (J.S. App. 10a). The jurisdictional statement was filed on April 17, 1981, and the Court noted probable jurisdiction on June 15, 1981 (J.A. 95). The jurisdiction of this Court rests on 28 U.S.C. 1252. *Hodel* v. *Virginia Surface Mining*

& Reclamation Ass'n, No. 79-1538 (June 15, 1981), slip op. 8 n.15; *Williams* v. *Zbaraz*, 448 U.S. 358, 366-368 (1980).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The pertinent portions of Article I, Section 8 (the Commerce Clause) and Article VI (the Supremacy Clause) of the Constitution, and the Tenth Amendment are set forth at J.S. App. 12a.

2. Title I (16 U.S.C. (Supp. III) 2601 *et seq.*), Section 210 of Title II (16 U.S.C. (Supp. III) 824a-3), and Title III (15 U.S.C. (Supp. III) 3201 *et seq.*) of the Public Utility Regulatory Policies Act of 1978 are set forth at J.S. App. 12a-67a.

STATEMENT

A. The Statutory Background

The Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 *et seq.* (PURPA), was enacted by Congress as part of a package of legislation [1] designed to combat the nationwide energy crisis. At the time, the generation of electrical energy consumed more than one-fourth of all energy resources used in the United States. S. Rep. No. 95-442, 95th Cong., 1st Sess. 7 (1977). Approximately one-third of all electricity in this country was generated by oil and natural gas, and electricity generation was one of the fastest growing segments of the nation's economy. S. Rep. No. 95-361, 95th Cong., 1st Sess. 32 (1977). Furthermore, electric utilities

[1] That legislative package also included the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 *et seq.*; the National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206 *et seq.*; the Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174 *et seq.*; and the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289 *et seq.*

were plagued with skyrocketing fuel costs and decreasing efficiency in the use of their generating capacity; both of these factors had an adverse effect on rates to consumers and on the economy. S. Rep. No. 95-442, *supra*, at 9. Accordingly, Congress determined that conservation by electric utilities of oil and natural gas was essential to the success of any effort to lessen the nation's dependence on foreign oil, to avoid a repetition of the shortage of natural gas that the nation had experienced in the winter of 1977, and to control consumer costs.

1. *Titles I and III of PURPA*

Titles I and III of PURPA are administered (with minor exceptions) by the Secretary of Energy. These provisions are designed to encourage the adoption of certain retail regulatory policies for electrical and natural gas utilities. Both titles share three common goals: (1) to promote conservation of energy supplied by utilities; (2) to optimize the efficient use of facilities and resources by utilities; and (3) to insure equitable rates to consumers. 16 U.S.C. (Supp. III) 2611; 15 U.S.C. (Supp. III) 3201. In order to achieve these goals, Titles I and III provide that state regulatory authorities and nonregulated utilities must "consider" the adoption and implementation of specific rate design and regulatory standards. While the Act requires the consideration of these standards, there is no requirement that any of the standards actually be adopted or implemented. See 16 U.S.C. (Supp. III) 2621(a), 2623(a); 15 U.S.C. (Supp. III) 3203(a).[2] See also 16 U.S.C. (Supp. III) 2627 (a), (b); 15 U.S.C. (Supp. III) 3208.

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[2] For example, 16 U.S.C. (Supp. III) 2621(a) and 15 U.S.C. (Supp. III) 3203(a) state, in identical language:

> Nothing in this subsection prohibits any State regulatory authority or nonregulated electric utility from mak-

Section 111 of PURPA, 16 U.S.C. (Supp. III) 2621, requires each state regulatory authority or non-regulated utility to consider whether to adopt and implement the following rate design standards: (1) Cost of service—rates for each class of electric consumers should reflect the costs of service to that class; (2) Prohibition of declining block rates [3]; (3) Time-of-day rates [4]; (4) Seasonal rates [5]; (5) Interruptible rates [6]; and (6) Development of load management

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ing any determination that it is not appropriate to implement any such standard, pursuant to its authority under otherwise applicable State law.

[3] "Declining block rates" are a traditional and still common structure used by utilities to charge for electricity. The highest unit rate is charged for basic electrical consumption, with a declining per-unit price for each block of additional consumption. See S. Rep. No. 95-442, *supra*, at 26-27.

[4] "Time-of-day rates" are a technique for reducing peak load. "Peak load" is the greatest demand for a utility's electricity. Demand varies by hour and season, usually reaching a daily peak in the afternoon and a seasonal peak in mid-summer or mid-winter. Utilities must have enough generating capacity to meet that demand; steps that reduce peak demand also reduce the required amount of generating capacity and the use of "peaking" generating equipment, which is frequently gas or oil fueled. Under time-of-day rates, utilities charge more for electricity consumed during peak load hours. See S. Rep. No. 95-442, *supra*, at 29.

[5] "Seasonal rates" also reduce peak load by charging higher rates for electricity consumed during the seasons when demand is greatest.

[6] "Interruptible rates" reduce peak load by charging a lower rate for electrical service which the utility can interrupt, or stop, during peak demand periods.

techniques.[7] Consideration of these standards was to have commenced not later than two years after PURPA's enactment, or by November 8, 1980, and a decision whether to adopt the standards is to be made by November 8, 1981. 16 U.S.C. (Supp. III) 2622 (b). However, the statute does not provide for any penalties if these deadlines are not met; the state authorities or nonregulated utilities must simply consider the standards at the first rate proceeding commenced after the deadline. 16 U.S.C. (Supp. III) 2622(c).

Section 113 of the Act, 16 U.S.C. (Supp. III) 2623, requires state regulatory authorities (and nonregulated utilities) to consider a second set of standards relating to the terms and conditions of electric service: (1) Prohibition of master metering in new buildings[8]; (2) Restrictions on the use of automatic ad-

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[7] "Load management techniques" are methods used to reduce the demand for electricity at peak times. For example, utilities can use remote-control devices to turn off air conditioners, heaters or other appliances for brief times during periods when the demand for electricity is particularly great.

Each of PURPA's rate design standards is intended to communicate accurately to users the true cost of the energy they are consuming. Time-of-day, seasonal and interruptible rates as well as load management techniques operate to reduce peak demand on a utility's generating capacity, which in turn reduces the need for construction of new power plants and the use of more expensive "peaking" generating plants that commonly burn oil or gas, consuming scarce fossil fuels. See S. Rep. No. 95-442, *supra*, at 9, 25.

[8] "Master metering" is the use of one electric meter for multiple units. Studies have shown that tenants of master metered buildings use an average of 35% more electricity than tenants in buildings where each unit has its own individual meter. S. Rep. No. 95-442, *supra*, at 31.

justment clauses[9]; (3) Disclosure to consumers of information regarding rate structures; (4) Procedural requirements relating to termination of service; and (5) Prohibition of the recovery of advertising costs from consumers. Section 303 of Title III, 15 U.S.C. (Supp. III) 3203, requires consideration of the latter two regulatory standards with respect to natural gas utilities. A decision as to the standards contained in Sections 113 and 303 was to have been made by November 1980, but, as with the Section 111 standards, there is no statutory penalty for failing to meet this deadline. Under Section 114 of Title I, 16 U.S.C. (Supp. III) 2624, each state authority (and nonregulated utility) is also required to consider whether utilities should set lower electrical rates for essential needs of residential consumers if the utility does not have such a rate in effect on November 1980.[10]

Titles I and III prescribe certain procedures to be followed by state regulatory authorities and nonregulated utilities in considering the standards. For example, each of the standards is to be considered in a hearing after public notice, and a written statement of the reasons for declining to implement or adopt any of the standards is to be made available to the public. 16 U.S.C. (Supp. III) 2621(b), (c)

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[9] "Automatic adjustment clauses" provide that as a utility's fuel costs rise it may increase its rates without public hearing or review by state regulatory authorities. Because automatic adjustment clauses provide the utility with no incentive to reduce its costs or to shift from oil or gas fueled generating facilities, they tend to discourage the efficient use of energy resources.

[10] The Act authorizes the Secretary of Energy to prescribe voluntary guidelines and provide technical assistance in order to aid the state regulatory authorities in their consideration of the Title I standards. 16 U.S.C. (Supp. III) 2641, 2642(b).

(2), and 2623(a), (c); 15 U.S.C. (Supp. III) 3203 (a), (c). "Any person" may bring an action in state court to enforce the obligation to hold hearings and make determinations. 16 U.S.C. (Supp. III) 2633 (c)(1); 15 U.S.C. (Supp. III) 3207(b)(1). Regulatory authorities and nonregulated utilities that had already considered the standards contained in Titles I and III prior to the enactment of PURPA need not repeat the consideration process as long as the initial proceeding was in "substantial conformance" with PURPA's requirements. 16 U.S.C. (Supp. III) 2634; 15 U.S.C. (Supp. III) 3210.

The Secretary of Energy, affected utilities, and consumers have the right to intervene and participate in any rate-related proceeding considering the Title I standards. 16 U.S.C. (Supp. III) 2631; the Secretary alone has a right of intervention under Title III. 15 U.S.C. (Supp. III) 3205.[11] The Act provides that any person (including the Secretary) who has intervened or otherwise participated in the original proceeding may obtain review in state court of any determination made with respect to the adoption of the Title I standards. 16 U.S.C. (Supp. III) 2633 (c)(1).[12] The Act does not authorize the Secretary

[11] Titles I and III both provide that the Secretary may bring an action in federal court to enforce his right to intervene. 16 U.S.C. (Supp. III) 2633(b)(1); 15 U.S.C. (Supp. III) 3207(a)(2).

[12] Consumers who have contributed substantially to the adoption of a position that they have advocated in proceedings to consider the Title I standards are entitled to reasonable attorney's fees, expert witness fees, and other reasonable costs from the utility. Procedures governing the award of such fees and costs, or alternative means of compensating persons who would not otherwise be adequately represented, may be established by states, state regulatory authorities, or nonregulated utilities. 16 U.S.C. (Supp. III) 2632.

to seek judicial review of decisions regarding the Title III standards; he may, however, participate as amicus curiae in any judicial review proceeding initiated by others. 15 U.S.C. (Supp. III) 3207(b)(2).

Titles I and III also contain certain reporting requirements. Within one year after PURPA's enactment, and annually thereafter for ten years, state regulatory authorities (and nonregulated utilities) are to report the progress of their consideration of the Titles I and III standards to the Secretary of Energy, who, in turn, is to submit a summary and analysis of these reports to Congress. 16 U.S.C. (Supp. III) 2626; 15 U.S.C. (Supp.III) 3209. Under Section 133, 16 U.S.C. (Supp. III) 2643, electric utilities are required to collect information concerning their costs of service. This information must be filed periodically with the Federal Energy Regulatory Commission and appropriate state regulatory agencies, and must be made available to the public. Title III requires the Secretary of Energy, in consultation with the Commission, state regulatory authorities, gas utilities and gas consumers, to submit a report to Congress on gas utility rate design. 15 U.S.C. (Supp. III) 3206.

2. *Section 210 of Title II of PURPA*

Section 210 was designed to encourage the development of cogeneration and small power production facilities. 16 U.S.C. (Supp. III) 824a-3. "Cogeneration" is the combined production of both electrical energy and useful thermal energy such as heat or steam. 16 U.S.C. (Supp. III) 796(18)(A). It includes, for example, a boiler that uses the steam it generates both to supply heat for an industrial process and to drive a turbine to generate electricity. Because cogeneration in effect involves reuse of what would otherwise

be waste energy, significantly less fuel is expended than would be needed to produce the two forms of energy by separate processes. A "small power production facility" is one that has a production capacity of no more than 80 megawatts and uses biomass, waste, or renewable resources (such as wind, water, or solar energy) to produce electric power. 16 U.S.C. (Supp. III) 796(17)(A).

Reliance on these sources of energy can reduce the demand for traditional fossil fuels. As Congress recognized, however, longstanding institutional impediments operated to discourage the development of these facilities. First, in order to function effectively, cogeneration and small power production facilities must rely on traditional electric utilities, both as a source of backup power and as a market for the surplus power they generate.[13] But, as Congress was aware, public utilities were not always cooperative in this regard.[14] Second, if cogeneration and small power production facilities were subject to regulation as public utilities, the complications and costs of

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[13] *Public Utility Rate Proposals of President Carter's Energy Program: Hearings on S. 122, S. 1300, S. 1363, S. 1364, S. 1469 (Part E) Before the Subcomm. on Energy Conservation and Regulation of the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. (Pt. 1) 191 (1977) (hereinafter referred to as *"Senate Hearings"*); *National Energy Act: Hearings on H.R. 6831, et al. Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. (Pt. 3) 323 (1977) (hereinafter referred to as *"House Hearings"*).

[14] See 123 Cong. Rec. 25848 (1977) (remarks of Sen. Percy); *id.* at 32403 (remarks of Sen. Durkin); *id.* at 32437 (remarks of Sen. Haskell); *id.* at 32419 (remarks of Sen. Hart). *House Hearings* (Pt. 3), *supra*, at 552-553.

complying with the regulatory requirements would discourage the development of these alternative energy sources.[15]

In order to alleviate the first impediment, Congress, in Section 210(a), 16 U.S.C. (Supp. III) 824a-3(a), directed the Federal Energy Regulatory Commission, in consultation with state regulatory authorities, to promulgate "such rules as it determines necessary to encourage cogeneration and small power production," including rules requiring utilities to offer to sell electricity to, and purchase electricity from, qualifying cogeneration and small power production facilities.[16] Section 210(f), 16 U.S.C. (Supp. III) 824a-3(f), requires each state regulatory authority and nonregulated utility to implement the rules adopted by the Commission under Section 210(a) regarding the purchase and sale of electricity to and

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[15] See H.R. Conf. Rep. No. 95-1750, 95th Cong., 2d Sess. 98 (1978); H.R. Rep. No. 95-496 (Pt. 4), 95th Cong., 1st Sess. 157 (1977); 123 Cong. Rec. 32399 (1977) (remarks of Sen. Cranston); *id.* at 32660 (remarks of Sen. Percy).

[16] The Commission was also directed to adopt rules to assure that the rates involved in these sales and purchases are just and reasonable. 16 U.S.C. (Supp. III) 824a-3(b), (c). With respect to sales from the utility to the cogenerator, Congress intended "just and reasonable" to refer to traditional utility ratemaking concepts. With regard to purchases by the utility from the cogenerator, Congress intended that the rate should be just and reasonable to the customers of the utility and should not exceed the incremental cost to the utility of generating the additional energy itself or purchasing it from another source. In both instances, Congress provided that the rates shall not discriminate against qualifying facilities, expressing concern that utilities might try to discourage sales or purchases by charging discriminatory rates. H.R. Conf. Rep. No. 95-1750, *supra*, at 97-98.

from qualifying facilities. In Section 210(h), 16 U.S.C. (Supp. III) 824a-3(h), the Commission is authorized to enforce this requirement in federal court against any state authority or nonregulated utility; if the Commission does not act after being requested to do so, enforcement may be sought by an electric utility or a qualifying facility.

In Section 210(e), 16 U.S.C. (Supp. III) 824a-3 (e), Congress sought to remove the second institutional barrier to development of cogeneration and small power production facilities by directing the Commission to prescribe rules under which such facilities are exempt from certain state and federal laws governing electric utilities.

Pursuant to Section 210(a), the Commission has adopted rules relating to purchases and sales of electricity to and from qualifying facilities. 18 C.F.R. Part 292; 45 Fed. Reg. 12214-12237 (1980). The Commission's regulations afford state regulatory authorities and nonregulated utilities great latitude in determining the precise manner in which to implement the requirements of these rules. 18 C.F.R. 292.401(a), (b). Under these regulations, state implementation may be accomplished by the issuance of regulations, on a case-by-case basis, or by any other action reasonably designed to give effect to the Commission's rules.[17]

Congress recognized that compliance with the requirements of PURPA would involve the expenditure of state funds. Accordingly, it authorized the Secretary of Energy to make grants to state regulatory authorities to assist them in carrying out the pro-

[17] The regulations also seek to minimize Commission involvement generally by encouraging utilities and qualifying facilities to resolve problems through negotiation. 18 C.F.R. 292.301(b).

visions of Titles I and III (including the reporting requirements), and the provisions of Section 210. 42 U.S.C. (Supp. III) 6807.[18]

B. The Proceedings Below

On April 24, 1979, appellees, the State of Mississippi and the Mississippi Public Service Commission, filed this action against the Secretary of Energy and the Federal Energy Regulatory Commission in the United States District Court for the Southern District of Mississippi, seeking a declaratory judgment that Titles I and III and Section 210 of PURPA are unconstitutional (J.A. 1, 3-12).[19] Appellees alleged that the Act is beyond the scope of Congress' power under the Commerce Clause and, moreover, constitutes an invasion of state sovereignty in violation of the Tenth Amendment. The essence of their argument was that PURPA impermissibly infringes on Mississippi's retail ratemaking authority over intrastate sales by public utilities located in the State and places an intolerable burden on state public utility regulatory activities.

Following cross-motions for summary judgment by all parties, the district court held that PURPA exceeds Congress' powers under the Commerce Clause (J.S. App. 1a-7a). In the court's view (*id.* at 4a), "[t]here is literally nothing in the Commerce Clause of the Constitution which authorizes or justifies the federal government in taking over the regulation and

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[18] Congress earmarked $40 million for each of the fiscal years 1979 and 1980 for assistance to state regulatory authorities to defray the costs of complying with PURPA. 42 U.S.C. (Supp. III) 6808.

[19] The Mississippi Power and Light Company was permitted to intervene in support of the plaintiffs.

control of public utilities. These public utilities were actually unknown at the writing of the Constitution."

In addition, the district court observed that the Mississippi Public Service Commission was authorized under state law "to regulate and control intrastate activities and policies of all utilities operating within the sovereign state of Mississippi" (J.S. App. 2a). Citing the Tenth Amendment (J.S. App. 2a n.2) and this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (J.S. App. 5a-6a n.4), the court declared that "[t]he sovereign state of Mississippi is not a robot, or lackey which may be shuttled back and forth to suit the whim and caprice of the federal government * * *" (*id.* at 2a). The court explained (*id.* at 7a):

> The United States is simply not delegated or vested by the Constitution with the power or authority to displace and to usurp the regulatory power and authority of the state of Mississippi over these utilities in the exercise of their intrastate functions and duties with respect to their intrastate customers in Mississippi. This Act simply does not even attempt to regulate commerce among the several states but it is a clear usurpation of power and authority which the United States simply does not have under the Commerce Clause of the Constitution.

Accordingly, the court concluded that "the United States does not have the power or authority to impose its three standards under PURPA upon the state of Mississippi under the guise of providing the solution to the nation's energy problems" (*ibid.*).

In its final judgment (J.S. App. 8a-9a), the district court specified that it found Titles I and III and

Section 210 of PURPA unconstitutional "in that they constitute a direct intrusion on integral and traditional functions of the State of Mississippi and violate the Constitution of the United States, especially the Tenth Amendment, the Supremacy Clause * * * and [the guarantee of] a republican form of government * * *."

SUMMARY OF ARGUMENT

The district court's decision invalidating all of Titles I and III and Section 210 of PURPA rests on two grounds. First, the court held that the statutory provisions are beyond Congress' power under the Commerce Clause because they are directed at the intrastate operations of public utilities. Second, the court ruled that the provisions violate the Tenth Amendment because they displace the authority of the states to regulate the intrastate activities of such utilities. Neither of these conclusions withstands analysis.[20]

I

The challenged provisions do not exceed Congress' commerce power. Congress found that a federal program designed to increase energy conservation and efficient use of energy resources was necessary to promote interstate commerce. That finding has a rational basis. Congress was aware that problems in the electric utility industry were contributing heavily

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[20] Although the district court's final judgment also purported to rest (J.S. App. 9a) on the Supremacy Clause (Article VI) and the guarantee of a republican form of government (Article IV, Section 4), the court's decision failed to explain how these constitutional provisions render the statute invalid. We accordingly do not address these provisions in this brief.

to the nation's increasing dependence on foreign oil. Moreover, the retail practices of electric utilities had a particularly adverse effect on the nation's oil supplies; for example, the retail rates of many utilities were structured in such a way as to discourage efficient consumption of energy, and the reluctance of many utilities to deal with cogenerators and small power producers constituted a major barrier to development of these alternative sources of energy.

Congress enacted the provisions at issue in order to protect interstate commerce from the adverse effects of these and other practices by utilities that led to inefficient utilization of energy resources. The means chosen by Congress are rationally related to this legitimate legislative purpose. That is enough to sustain Congress' exercise of its commerce power. ~~Hodel~~ Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, No. 79-1538 (June 15, 1981).

II

The challenged provisions do not violate the Tenth Amendment. This case is not like *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), where this Court invalidated the application to the states of mandatory federal minimum wage legislation. In *National League of Cities*, Congress could not have overcome Tenth Amendment objections by taking over the traditional functions of state and local governments in such areas as fire prevention, police protection and sanitation. Here, on the other hand, the federal government already exercised regulatory authority over the interstate activities of public utilities, and Congress could have preempted the states completely in the regulation of intrastate transactions. There is no reason to invalidate the statute because Congress, out of deference to state sovereignty, adopted a less intrusive scheme that permits the states to continue to perform their regulatory functions with respect to

intrastate transactions by public utilities. The legislative history clearly demonstrates that PURPA was carefully crafted so as to preserve the states' "'separate and independent existence.'" *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 851, quoting from *Coyle* v. *Oklahoma*, 221 U.S. 559, 580 (1911).

Furthermore, the statute does not require the states to restructure integral governmental operations, since the states are not obligated to participate in the regulatory program unless they are already involved in the business of utility regulation. Beyond that, each of the specific provisions at issue permits the states broad discretion in determining how to achieve compliance with the regulatory program. In light of these factors, the statute cannot be said to impair the ability of the states "'to function effectively in a federal system.'" *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 852, quoting from *Fry* v. *United States*, 421 U.S. 542, 547 n.7 (1975). In any event, even if the statute does operate against the states in a manner that would otherwise be impermissible under the Tenth Amendment, the nature of the federal interest in combatting the nationwide energy crisis justifies the statute's limited interference with state prerogatives. *United States* v. *Fry*, *supra*.

ARGUMENT

I

THE CHALLENGED PROVISIONS OF THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978 ARE WITHIN CONGRESS' PLENARY POWER TO REGULATE INTERSTATE COMMERCE

The district court invalidated the statutory provisions at issue as beyond congressional power because, in its words (J.S. App. 4a), "[t]here is liter-

ally nothing in the Commerce Clause of the Constitution which authorizes or justifies the federal government in taking over the regulation and control of [the intrastate operations of] public utilities." That approach misapprehends the proper role of the courts in assessing the validity of federal legislation implementing the Commerce Clause. As this Court recently noted, "[a] court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." *Hodel* v. *Indiana*, No. 80-231 (June 15, 1981), slip op. 7. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, No. 79-1538 (June 15, 1981), slip op. 9. In the latter case, the Court pointed out (*id.* at 9-10) that

> [j]udicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress. See *National League of Cities* v. *Usery*, 426 U.S., at 840; *Cleveland* v. *United States*, 329 U.S. 14, 19 (1946); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). This power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons* v. *Ogden*, 9 Wheat. 1, 196 (1824). Moreover, this Court has made clear that the commerce power extends not only to "the use of channels of interstate or foreign commerce" and to "protection of the instrumentalities of interstate commerce . . . or persons or things in commerce," but also to "activities affecting commerce." *Perez* v. *United States*, 402 U.S. 146, 150 (1971). As we ex-

plained in *Fry* v. *United States*, 421 U.S. 542, 547 (1975) "[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." See *National League of Cities* v. *Usery*, *supra*, at 840; *Heart of Atlanta Motel, Inc.* v. *United States*, *supra*, at 255; *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *United States* v. *Darby*, *supra*, at 120-121.

The challenged provisions of PURPA pass muster under these settled principles.

1. In enacting PURPA, Congress found that the activities it sought to regulate affect interstate commerce. Section 2 of the Act, 16 U.S.C. (Supp. III) 2601, recites Congress' finding that

> the protection of the public health, safety, and welfare, the preservation of national security, and the proper exercise of congressional authority under the Constitution to regulate interstate commerce require—
>
> (1) a program providing for increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electric consumers,
>
> (2) a program * * * to provide other measures with respect to the regulation of the wholesale sale of electric energy, [and]
>
> * * * * *
>
> (4) a program for the conservation of natural gas while insuring that rates to natural gas consumers are equitable [.]

The initial inquiry is whether the findings have a rational basis. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, supra,* slip op. 10; *Hodel* v. *Indiana, supra,* slip op. 7.

The legislative record provides ample support for Congress' findings. After extensive hearings,[21] the appropriate committees in both Houses of Congress issued reports detailing the magnitude of the nation's energy problems and the need to alleviate those problems by promoting energy conservation and more efficient use of energy resources. See S. Rep. No. 95-442, 95th Cong., 1st Sess. 7-10 (1977); H.R. Rep. No. 95-543, 95th Cong., 1st Sess. 5-10 (1977); H.R. Rep. No. 95-496 (Pt. 4), 95th Cong., 1st Sess. 3-7, 125-130 (1977).[22] Congress was aware that domestic

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[21] The President's proposed National Energy Act was introduced in Congress in May 1977. The Subcommittee on Energy Conservation and Regulation of the Senate Committee on Energy and Natural Resources conducted five days of hearings on the portions of the legislation that were incorporated into PURPA. *Senate Hearings* (Pts. 1 & 2), *supra.* The Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce held hearings for four days on PURPA. *House Hearings* (Pt. 3), *supra.* In addition, hearings on similar legislative proposals were held in both the Senate and the House during prior sessions of Congress. H.R. Rep. No. 95-496 (Pt. 4), *supra,* at 170-175. See, *e.g., Electric Utility Rate Reform and Regulatory Improvement: Hearings on S. 1666, et al. Before the Senate Comm. on Commerce,* 94th Cong., 2d Sess. (1976); *Electric Utility Rate Reform and Regulatory Improvement: Hearings on H.R. 12461, et al. Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce,* 94th Cong., 2d Sess. (Pts. 1 & 2) (1976).

[22] See also 124 Cong. Rec. S17528 (daily ed. Oct. 7, 1978) (remarks of Sen. Jackson); *id.* at S17530 (remarks of Sen. Bumpers); 124 Cong. Rec. S17804 (daily ed. Oct. 9, 1978)

oil production had failed to keep up with demand, and that, as a result, the nation had become increasingly dependent on foreign sources of oil. H.R. Rep. No. 95-496 (Pt. 4), *supra*, at 3.[23] The House Committee observed that "[r]eliance upon imported oil to meet the bulk of U.S. oil demands could seriously jeopardize the stability of the Nation's economy and could undermine the independence of the United States." *Ibid.* See H.R. Rep. No. 95-543, *supra*, at 5-6. At the same time, the nation had recently experienced severe shortages in its supplies of natural gas. *Id.* at 7. In light of these events, Congress concluded that the energy problem was nationwide in scope.[24]

Problems in the electric utility industry, particularly declining efficiency, were contributing heavily to increased consumption of foreign oil. Both the House and Senate committees pointed out that the electric industry was the most capital-intensive major industry in the United States, and that it consumed more than one-fourth of the total energy resources used in this country while supplying only 12% of the nation's end user demand for energy. S. Rep. No.

(remarks of Sen. Robert Byrd); 124 Cong. Rec. H13103 (daily ed. Oct. 14, 1978) (remarks of Rep. Ashley); *id.* at H13121-H13122 (remarks of Rep. Dingell); 123 Cong. Rec. 25894 (1977) (remarks of Rep. Ashley); *id.* at 25916-25917 (remarks of Rep. Ottinger); *id.* at 27063-27064 (remarks of Rep. Wolff).

[23] In 1970, the United States imported 23% of its oil. By 1976, this percentage had increased to 42% and was expected to continue rising. See H.R. Rep. No. 95-543, *supra*, at 5.

[24] See, *e.g.*, 123 Cong. Rec. 32437-32438 (1977) (remarks of Sen. Brooke); *id.* at 32444 (remarks of Sen. Percy); *Senate Hearings* (Pt. 1), *supra*, at 295; *House Hearings* (Pt. 3), *supra*, at 70.

95-442, *supra*, at 7, 8; H.R. Rep. No. 95-496 (Pt. 4), *supra*, at 125. In recent years, the electric utility industry had been beset by numerous problems, including "declining load factors,[25] increasing fuel costs, rapidly rising costs of new capacity, lower than expected powerplant reliability and a virtual end to the economies of scale associated with increasing sizes of generating plants." H.R. Rep. No. 95-496 (Pt. 4), *supra*, at 129. See S. Rep. No. 95-442, *supra*, at 9. These problems resulted in higher electric bills for the consuming public, a result exacerbated by the rate structures employed by most utilities, which, in effect, granted volume discounts to large users. *Id.* at 26.

Congress believed that these developments demonstrated the need to establish federal standards regarding retail sales of electricity in order to encourage the restructuring of electric utility rates in a manner that would communicate accurately to customers the costs of the energy consumed. Through these changes Congress sought to promote conservation and more efficient use of scarce energy resources. See S. Rep. No. 95-442, *supra*, at 24-32; H.R. Rep. No. 95-496 (Pt. 4), *supra*, at 131-133, 136-138, 170-171.[26] The House

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[25] "Load factor," the ratio of average utility load to "peak load" (see note 4, *supra*) is used to measure a utility's efficiency. The average national load factor declined between 1965 and 1977, reflecting a "substantial reduction" in the efficiency of existing generating plants. See S. Rep. No. 95-442, *supra*, at 9; H.R. Rep. No. 95-496 (Pt. 4), *supra*, at 129.

[26] Because it was uncertain about the feasibility of establishing federal retail rate design standards for the natural gas industry, Congress directed the Secretary of Energy to study the matter. 15 U.S.C. (Supp. III) 3206. See H.R. Rep. No. 95-496 (Pt. 4), *supra*, at 130.

Committee explained that while some states had begun to experiment in the area of electric utility rate design, many states were not expected to do so for a variety of reasons, including competition with other states for industries that are large-scale consumers of electricity, and the lack of sufficient expertise and resources at the state level to conduct the types of cost studies that are necessary prior to implementing rate design reforms. *Id.* at 129-130, 132-133.[27]

In addition, Congress determined that the increased development of cogeneration and small power production facilities would help to conserve energy. The evidence before Congress showed the substantial potential contribution of industrial cogeneration and small power production to the nations' energy supplies. S. Rep. No. 95-442, *supra*, at 21, 23.[28] Thus, it was estimated that if the proper incentives were given, industrial cogeneration alone could produce sufficient electric power by 1987 to account for 7% to 10% of the nation's electrical generating capacity, representing energy savings equivalent to 200,000 barrels of oil per day, and allowing significant cuts in capital expenditures for new power plants.[29] Congress concluded that legislation was necessary to overcome several institutional barriers that hindered the development of

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[27] See 123 Cong. Rec. 32438 (1977) (remarks of Sen. Brooke); *id.* at 32443 (remarks of Sen. Percy); *Senate Hearings* (Pt. 1), *supra*, at 164, 295-296, 327-328, 344, 422, 427, 428.

[28] See 123 Cong. Rec. 24714-24716 (1977); *id.* at 25848, 32660 (remarks of Sen. Percy); *id.* at 32418-32420 (remarks of Sens. Hart and Sasser); *Senate Hearings* (Pt. 1), *supra*, at 136-138; *id.* (Pt. 2), at 210, 218-227; *House Hearings* (Pt. 3), *supra*, at 323-324, 341, 356.

[29] *Senate Hearings* (Pt. 1), *supra*, at 126, 141-143, 236.

these alternative energy sources. See pages 9-11, *supra*.

Even absent such strong support in the legislative record for Congress' findings that the activities it sought to regulate have a substantial effect on interstate commerce, it is difficult to conceive of a more basic element of interstate commerce than energy—a product that reaches into virtually every home and commercial or manufacturing facility in the country. No state relies solely on its own resources in this regard, nor is it permitted to withhold its resources from others. See, *e.g.*, *Hughes* v. *Oklahoma*, 441 U.S. 322, 337-339 (1979); *Baldwin* v. *Montana Fish & Game Commission*, 436 U.S. 371, 385-386 (1978).

For example, the utilities involved in this case, the Mississippi Power and Light Company and the Mississippi Power Company, sell to their retail customers electric power that is generated in part beyond Mississippi's borders (see J.A. 93, 94). By means of a widespread interstate electric grid, these Mississippi utilities draw on utilities and facilities located in other states to meet the load demands of their customers and they offer reciprocal services to utilities in other states.[30] It is evident that the policies adopted by utilities such as these with regard to such matters as rate design and relationships with cogeneration facilities have a substantial impact upon the nation's fuel supply and on the demand for imported oil. Thus, the intrastate activities of the utilities reg-

[30] These two companies are the only two Mississippi utilities subject to rate regulation by the State that are also subject to Title I of PURPA. See 44 Fed. Reg. 76197-76198 (1979). Both are wholly owned by multi-state public utility holding companies that operate integrated and interconnected systems in the southern states. See *Moody's Public Utility Manual* 2201-2203, 2235, 2242, 2714-2716, 2758, 2766 (1980).

ulated by the Mississippi Public Service Commission bring these utilities squarely within the reach of Congress' power over interstate commerce. See *FPC* v. *Florida Power & Light Co.*, 404 U.S. 453, 458 (1972).

The district court's conclusion that federal regulation of the intrastate activities of Mississippi's utilities is beyond Congress' power under the Commerce Clause cannot be squared with this Court's recent decision in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, *supra*. In rejecting the argument that the Surface Mining Control and Reclamation Act of 1977 was not a valid exercise of congressional power under the Commerce Clause "because the Act regulates land use, a local activity not affecting interstate commerce," the Court emphasized that "[t]he denomination of an activity as a 'local' or 'intrastate' activity does not resolve the question whether Congress may regulate it under the Commerce Clause." Slip op. 14. There can be no dispute that energy, like coal, "is a commodity that moves in interstate commerce." *Id.* at 14-15.

2. The remaining inquiry is whether "the Act's regulatory scheme is reasonably related to the goals Congress sought to accomplish." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, *supra*, slip op. 16. One can debate whether the means chosen represent the wisest choice. But it is clear enough that Congress was not irrational in concluding that limited federal regulation of retail sales of electricity and natural gas, and of relationships between cogenerators and electric utilities, was essential to prevent "destructive interstate competition" (*id.* at 15) and to protect interstate commerce from the adverse effects of various practices in which utilities had

engaged that led to inefficient utilization of energy resources. The rate design and regulatory standards in Titles I and III certainly tend to promote the conservation of energy and the efficient use of resources (see pages 4-6 and notes 3-9, *supra*). Similarly, the provisions concerning cogeneration and small power production in Section 210 work to bolster the nation's self-sufficiency in the energy field by encouraging the development of alternative energy sources (see pages 8-11, *supra*).[21] That is enough to sustain the challenged portions of PURPA as within Congress' power under the Commerce Clause.[22]

II

THE CHALLENGED PROVISIONS OF PURPA DO NOT VIOLATE THE TENTH AMENDMENT

In addition to holding that the Commerce Clause did not authorize Congress to enact provisions that regulate the intrastate activities of public utilities,

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[21] The briefs of several amici, including that of the National Alliance for Hydroelectric Energy, Inc., *et al.*, describe the actual and potential contributions of Section 210 to improving the nation's energy posture.

[22] Even if some of the specific provisions of Titles I and III cannot be shown to be related to the basic congressional purpose of fostering interstate commerce, that would not render any of those provisions unconstitutional. As the Court stated in *Hodel* v. *Indiana*, *supra*, slip op. 18 n.17 (citations omitted):

> A complex regulatory program such as established by the Act, can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.

the district court concluded that the provisions at issue violate the constitutional limitation imposed by the Tenth Amendment. Citing this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the court below ruled that the Act contravenes the Tenth Amendment because it intrudes "on integral and traditional functions of the State of Mississippi" (J.S. App. 8a-9a) by "displac[ing]" and "usurp[ing]" the State's exercise of regulatory power over the intrastate functions of public utilities that operate within its borders (*id.* at 7a).

In *National League of Cities*, the Court held that the 1974 amendments to the Fair Labor Standards Act, which "extended the minimum wage and maximum hour provisions to almost all public employees employed by the States and by their various political subdivisions" (426 U.S. at 836), were unconstitutional because they "directly supplant[ed] the considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales in state employment" (*id.* at 848). Noting that "[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime" (*id.* at 845), the Court concluded that "the challenged amendments operate[d] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions * * *" (*id.* at 852) and therefore "would impair the States' 'ability to function effectively in a federal system'" (*ibid.*, quoting *Fry* v. *United States*, 421 U.S. 542, 547 n.7 (1975)) and in-

trude upon state " 'functions essential to separate and independent existence.' " 426 U.S. at 845, quoting *Coyle* v. *Oklahoma*, 221 U.S. 559, 580 (1911), and *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869).

More recently, in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, *supra*, slip op. 21 (citations and footnote omitted; emphasis in original), the Court concluded that

> in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

In addition, the Court noted that even where these three requirements are met, "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies State submission." *Ibid.* n.29, citing *Fry* v. *United States*, *supra*. With these principles in mind, we turn to examine the statutory provisions at issue here.

A. The Provisions of PURPA Survive the Tenth Amendment Test Established in *Virginia Surface Mining*

We note at the outset that Congress could have preempted the states completely in the regulation of retail sales by utilities of electricity and natural gas, and in the regulation of transactions between utili-

ties and cogenerators. See *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945). Accordingly, the situation in this case is unlike that in *National League of Cities*, where Congress could not have overcome Tenth Amendment objections by directly taking over the traditional functions of state and local governments in such areas as fire prevention, police protection and sanitation. Rather, this case is similar to *Virginia Surface Mining*, where the Court stressed that since "Congress could constitutionally have enacted a statute prohibiting any state regulation of surface mining[,] [w]e fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role" (slip op. 24).

To be sure, the statute in suit places certain regulatory responsibilities upon the states. Some of the provisions at issue do more than "allow" state regulation.[23] Portions of Titles I and III require state

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[23] There can be no question about the constitutionality of those portions of PURPA that are directed not at the states but at public utilities. These parts of the Act are valid under the Tenth Amendment because they "regulate[] only 'individuals and businesses necessarily subject to the dual sovereignty of the government of the Nation and the State in which they reside.'" *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, *supra*, slip op. 26, quoting from *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 845. The district court ignored this distinction in its sweeping order invalidating Titles I and III and Section 210 in their entirety.

Thus, the provisions of Titles I and III that require the consideration of ratemaking and regulatory standards are valid insofar as they apply to nonregulated utilities. In addition, Section 133, 16 U.S.C. (Supp. III) 2643, which merely requires electric utilities to prepare reports concerning costs of service, is also constitutional. Similarly, the Commission

regulatory authorities to "consider" whether or not to adopt and implement certain regulatory standards; the state commissions must adhere to certain procedural requirements in considering these standards, must permit the Secretary of Energy to participate in the proceedings, and must report to the Secretary their progress in the consideration process. Section 210(f)(1) requires the state authorities to implement the Federal Energy Regulatory Commission's rules concerning transactions between cogenerators and electric utilities; the Commission is empowered under Section 210(h)(2) to enforce this statutory responsibility in federal court. Nevertheless, we submit that these parts of the Act pass muster under the Tenth Amendment because they do not "address matters that are indisputably 'attributes of state sovereignty,'" and because it is apparent that "the States' compliance with the federal law would [not] directly impair their ability 'to structure integral operations in areas of traditional functions.'" *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, supra*, slip op. 21, quoting from *National League of Cities* v. *Usery, supra*, 426 U.S. at 845, 852.[34]

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should be permitted to promulgate its Section 210 rules, and to enforce those rules with respect to nonregulated utilities. Finally, Section 210(e), which provides for the exemption of cogenerators and small power producers from federal and state regulatory statutes, also survives scrutiny. Congress has the authority to exempt certain parties from the provisions of federal statutes, and, under the Supremacy Clause, it may also preempt state law in areas of concurrent federal and state jurisdiction. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, supra*, slip op. 23.

[34] The principle that federal legislation is not necessarily invalid merely because it requires affirmative state action was recognized, albeit in a different context, in *Testa* v. *Katt*, 330 U.S. 386, 391 (1947), where the Court emphasized that "the

1. The regulation of intrastate activities of electric and gas utilities is not an essential attribute of state sovereignty.[35] Joint federal and state jurisdiction over public utilities has existed since the passage of the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063. As the public utility system developed, federal involvement became necessary to fill

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Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people * * *. [T]he obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide." See also *Adams* v. *Maryland*, 347 U.S. 179, 183 (1954) ("[S]ince Congress in the legitimate exercise of its powers enacts 'the supreme Law of the Land,' state courts are bound by [the federal immunity statute], even though it affects their rules of practice.").

The reliance placed by Mississippi Power and Light Company (Motion to Affirm at 18) on *Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66 (1861), is misplaced. In that case, the Court held that the federal government could not compel the governor of one state to deliver a fugitive upon the demand of the governor of another state. Writing for the Court, Chief Justice Taney declared that "the Federal Government, under the Constitution, has no power to impose on a State Officer, as such, any duty whatever, and compel him to perform it * * *." 65 U.S. (24 How.) at 107. Although Professor Hart has remarked that, with certain limited exceptions, "Taney's statement can stand today" (Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 516 (1954)), this Court has recently observed that *Dennison* and similar cases have not survived as precedent. See *Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 676 (1978).

[35] Indeed, the Mississippi Public Service Commission was not involved in the regulation of gas and electric utilities until 1956 (see Mississippi's Motion to Affirm at 6).

gaps in state regulatory systems that were interpreted by this Court as beyond the constitutional reach of state authorities. *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 213-214 (1964); *Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 89-90 (1927). See also S. Rep. No. 74-621, 74th Cong., 1st Sess. 17 (1935); H.R. Rep. No. 74-1318, 74th Cong., 1st Sess. 7-8 (1935). Given this long history of concurrent federal and state regulation of public utilities, the regulatory program established by PURPA cannot be said to "abrogate the States' * * * plenary authority" to make determinations "'essential to [their] separate and independent existence.'" *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 845-846. Compare *Coyle* v. *Oklahoma*, 221 U.S. 559 (1911) (holding that Congress may not interfere with a State's choice as to where to locate its seat of government), with *United States* v. *California*, 297 U.S. 175 (1936) and *California* v. *Taylor*, 353 U.S. 553 (1957) (holding that Congress may enact legislation governing the activities of state-owned and operated railroads).

Moreover, as noted above, Congress could constitutionally have achieved the same results it sought to reach in PURPA by enacting legislation that completely preempted the states in this area. Such legislation would not have been subject to attack under the Tenth Amendment even though it might have displaced the states' exercise of their "police powers." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, *supra*, slip op. 24-26. It is difficult to appreciate why the statute should be more vulnerable because Congress chose a less radical course out of concern that preemptive federal regulation would con-

stitute undue interference with the traditional authority of state regulatory commissions over retail utility ratemaking.

There is no doubt that Congress believed it was deferring to state prerogatives. As initially proposed by the President (Pt. E of S. 1469 and H.R. 6831, 95th Cong., 1st Sess. (1977)) and approved by the House of Representatives (H.R. 8444, 95th Cong., 1st Sess. (1977)), the bill would have established a regulatory program similar to that upheld in *Virginia Surface Mining*. Under this scheme, state regulatory authorities would have been permitted, but not required, to enforce the retail ratemaking and regulatory standards and federal rules concerning cogeneration; if the state authorities chose not to participate in the program, the regulatory burden would have been assumed by federal authorities. See H.R. Rep. No. 95-543, *supra*, at 20-21; H.R. Rep. No. 95-496 (Pt. 4), *supra*, at 133, 145. The Senate, however, developed an entirely different version of the legislation in S. 2114, 95th Cong., 1st Sess. (1977). The Senate bill reflected a different approach with respect to the appropriate roles of the federal and state governments in the regulatory program. Under the Senate version, the Secretary of Energy would not have been empowered to enforce federal ratemaking and regulatory standards, but merely would have been authorized to intervene in proceedings before state commissions in order to advocate adoption of those standards. In addition, the Senate bill would have required the Secretary to "recommend" to state commissions the adoption of "guidelines" with respect to relationships between cogeneration and electric utilities.

The Senate version was adopted in response to widespread criticism of the preemption features in

the Administration and House proposals. Numerous witnesses testifying before the Senate subcommittee expressed opposition to federal preemption for a variety of reasons, including the belief that the necessary expertise to implement substantive reforms in this area was at the state, not the federal, level; that the creation of an additional regulatory layer would be burdensome and impractical; that a centralized regulatory authority would not be sufficiently responsive to local needs; and that the states should be allowed to continue to experiment with different regulatory approaches.[86] Based on this testimony, the Senate Committee concluded that enactment of preemptive legislation would represent an unwarranted "extension of Federal involvement into utility regulation." S. Rep. No. 95-442, *supra*, at 13; see *id.* at 9.[87] The Senate accordingly restricted the federal

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[86] For example, a representative of the National Association of Regulatory Utility Commissioners ("NARUC"), a quasi-governmental organization composed of the utility commissions of all 50 states, summarized his position as follows:

> [W]e would indicate first that the preemption of valid State regulatory authority is unnecessary and unjustifiable. Second, State commissions are involved already in the innovative ratemaking process. Third, the imposition of another layer of * * * regulation at the retail level would result in increased administrative burden and more regulatory lag * * *.

Senate Hearings (Pt. 1), *supra*, at 758. See also *id.* at 254, 268, 271, 312-313, 332-333, 362-365, 367-369, 370-371, 429, 435, 451, 453, 474, 485-487, 490, 514, 755, 758, 778, 837; *id.* (Pt. 2), at 10, 31, 37, 44-45, 127, 445-447.

[87] See also 123 Cong. Rec. 32393, 32430 (1977) (remarks of Sen. Johnston); *id.* at 32394, 32411 (remarks of Sen. Domenici); *id.* at 32394-32395 (remarks of Sen. Jackson); *id.* at 32395 (remarks of Sen. Bartlett); *id.* at 32410 (remarks of Sen. Durkin).

role "to one of data collection, further study and evaluation of ratemaking methods and informed advocacy of rate reform within the existing and traditional State and local ratemaking procedures." *Id.* at 13-14. In addition, the Senate sought to encourage, without federal preemption, the development of cogeneration and small power production facilities. *Id.* at 14.

The bill that emerged from conference reflected a compromise between the House and Senate versions. As Senator Jackson remarked in presenting the Conference Report to the Senate, "[t]he conference bill leaves intact the authority and discretion of the State commissions and nonregulated municipal and cooperative utilities with respect to ratemaking." 124 Cong. Rec. S17528 (daily ed. Oct. 7, 1978). Senator Robert Byrd similarly observed that the conference bill

> preserves existing regulatory relationships. This means that local conditions will continue to dictate local policies. At the same time, it encourages flexibility and innovation. Indeed, the beauty of the conference report is that it is a national policy which is responsive to each State's needs without penalizing a State which does not fit the norm.

124 Cong. Rec. S17804 (daily ed. Oct. 9, 1978).[38]

The legislative history thus reflects an overriding concern to permit state officials to retain their traditional authority over retail utility regulation. In en-

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[38] See also 124 Cong. Rec. S17580 (daily ed. Oct. 7, 1978) (remarks of Sen. Bumpers); 124 Cong. Rec. S17801 (daily ed. Oct. 9, 1978) (remarks of Sen. Metzenbaum); *id.* at S17802-S17803 (remarks of Sens. Hansen and Jackson); *id.* at S17806 (remarks of Sens. Durkin and Jackson).

acting PURPA, Congress sought to wield its commerce power in a fashion that would preserve the states' " 'separate and independent existence.' " *National League of Cities* v. *Usery*, *supra*, 426 U.S at 851, quoting from *Coyle* v. *Oklahoma*, *supra*, 221 U.S. at 580. As the legislative record clearly demonstrates, PURPA was carefully crafted in recognition —rather than in derogation—of the benefits of our dual system of government.[39]

2. The challenged provisions do not "directly impair [the states'] ability 'to structure integral operations in areas of traditional functions.' " *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, *supra*, slip op. 21, quoting from *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 852. To begin with, nothing in Titles I and III or Section 210 of PURPA requires the states to establish a public service commission or to extend state jurisdiction to utilities that are not subject to state regulation. PURPA merely obligates the states to perform certain regulatory functions with respect to the utilities that they are already regulating.[40] Examination of the particular

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[39] See *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 530 (1945) ("[T]he 'insulated chambers of the States' are still laboratories where many lessons in regulation may be learned by trial and error on a small scale without involving a whole national industry in every experiment.").

[40] Thus, the provisions at issue do not give rise to the concerns expressed in *District of Columbia* v. *Train*, 521 F. 2d 971, 994 n.27 (D.C. Cir. 1975), vacated and remanded *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977), to the effect that the Tenth Amendment protects the states "from federal compulsion to exercise state governmental functions in an area where they choose to remain inactive." Here, the states are not obligated to participate in the regulatory program unless they are already engaged in the business of regulating utili-

provisions of the Act and of the regulations promulgated by the Commission under Section 210 underscores our contention that these provisions represent a minimal intrusion on preexisting state regulatory activities.[41]

Titles I and III do not displace the states' basic authority to design a public utility rate structure that is responsive to state needs. In these provisions Congress did not grant federal authorities the power to force any particular substantive choices upon a state; rather, the Act clearly provides that the states are free to choose whether or not to adopt or implement any of the federal standards. 16 U.S.C (Supp. III) 2621(a), 2623(a), 2627(a), (b); 15 U.S.C. (Supp. III) 3203(a), 3208.

Moreover, the hearings on the PURPA standards are to be conducted in accordance with state procedures, except that minimum due process elements—notice and a public statement of reasons in support of a determination—must be provided. But that can be no ground of complaint here. Mississippi law already

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ties. Where a state is involved in utility regulation, direct preemptive federal regulation of utilities would seem to constitute a greater intrusion upon the state's prerogatives than a system in which the state is given broad discretion to administer a limited federal program.

[41] Mississippi argues (Motion to Affirm at 10) that the provisions at issue impose a financial burden upon the State. But, as this Court recently reiterated in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, supra*, slip op. 26 n.33, a measurable financial impact, standing alone, is insufficient to establish a Tenth Amendment violation. Moreover, Congress was aware that compliance with PURPA would involve some expenditures of state funds, and it therefore made federal funds available to help the states meet those expenses. 42 U.S.C. (Supp. III) 6807, 6808.

provides for reasonable notice (Miss. Code Ann. § 77-3-33 (1973)), and requires the Public Service Commission to keep a "full and complete record" of all hearings (Miss. Code Ann. § 77-3-63 (1973)) and to "make and file its findings and order, and its opinion, if any" (Miss. Code Ann. § 77-3-59 (1973)). Furthermore, under state law "[a]ll findings shall be supported by substantial evidence presented in the hearing and shall be in sufficient detail to enable the court on appeal to determine the controverted questions presented by the proceeding, and the basis of the commission's conclusion" (*ibid.*). Thus, the proceedings of the Mississippi Public Service Commission need not be altered significantly, if at all, to meet the requirements of PURPA.

If a state regulatory authority decides to adopt one or more of the federal standards, it has full discretion to determine the manner of implementation. It was intended that the standards be adapted to local needs; they may be partially implemented or phased-in, and exceptions or other means may be provided to alleviate any resulting hardships. H.R. Conf. Rep. No. 95-1750, *supra*, at 13, 16. In addition, state regulatory authorities and nonregulated utilities that had already considered the rate design and other standards prior to the enactment of PURPA need not repeat the consideration process as long as the initial proceeding was in "substantial conformance" with PURPA's requirements. 16 U.S.C. (Supp. III) 2634; 15 U.S.C. (Supp. III) 3210.[42]

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[42] Congress recognized that state regulatory authorities could not have anticipated the Act's procedural provisions, and noted that not having permitted intervention and partici-

In drafting the provisions of Section 210, Congress was also careful to minimize federal interference with state governmental functions. Congress has traditionally regulated wholesale electricity transactions, while leaving to the states the regulation of retail sales of electricity and intrastate transmissions of electric power incident thereto. See 16 U.S.C. 824(a); *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 530 (1945); *Jersey Central Power & Light Co.* v. *FPC*, 319 U.S. 61 (1943). A sale from a cogenerator to a utility is a wholesale transaction (and thus subject to Commission regulation), whereas the sale of back-up power from a utility to a cogenerator is a retail transaction. Congress was presented with a novel situation: in order to foster development of cogeneration and small power production facilities, regulation of both retail and wholesale transactions between those facilities and electric utilities was deemed essential. Because the states were already involved in regulating retail transactions, Congress, in Section 210, preserved state authority over these transactions. In addition, because wholesale sales of surplus electricity from the cogenerator to the utility may have an impact upon the utility's retail sales to its regular customers, Congress provided that states already involved in regulating retail transactions of a particular utility should also exercise regulatory responsibilities over this limited class of wholesale transactions.

Although state regulatory authorities are required to "implement" the rules promulgated by the Commission pursuant to Section 210, considerable discretion is afforded as to how to achieve compliance. Un-

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pation by the Secretary or affected consumers and utilities would not "automatically constitute the absence of substantial conformance." H.R. Conf. Rep. No. 95-1750, *supra*, at 85.

der the Commission's regulations, state implementation "may consist of the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities * * *, or any other action reasonably designed to implement [the Commission's substantive rules]." 18 C.F.R. 292.401(a). In addition, the regulations provide that state authorities may apply to the Commission for waivers from the general regulatory requirements. 18 C.F.R. 292.403.

During the rulemaking proceeding that led to the promulgation of these regulations, the National Association of Regulatory Utility Commissioners (see note 36, *supra*) stated that it "strongly supports the delegation of authority to State regulatory commissions to implement Section 210 of PURPA" (J.A. 84). As NARUC further explained (J.A. 86), "[a]lthough this delegation is prescribed by section 210(f) of PURPA, we particularly support the provisions in the proposed regulations which grant the States broad flexibility in determining the procedures by which the regulations are implemented." These comments reflect the extent of discretion that state officials retain under the Commission's Section 210 regulations.

We do not deal here with a scheme comparable to the situations presented in *Maryland* v. *EPA*, 530 F.2d 215 (4th Cir. 1975), vacated and remanded *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977); *District of Columbia* v. *Train*, 521 F.2d 971 (D.C. Cir. 1975), vacated and remanded *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977); and *Brown* v. *EPA*, 521 F.2d F.2d 827 (9th Cir. 1975), vacated and remanded, 431 U.S. 99 (1977). In those cases, the EPA Administrator construed the Clean Air Act as authorizing him, in the event a state failed to submit an acceptable implementation plan regulating the sources of air pollution,

to promulgate a detailed federal plan and to compel the states, upon pain of civil and criminal penalties, to implement that plan by enacting legislation and appropriating funds. See *Maryland* v. *EPA*, *supra*, 530 F.2d at 224; *District of Columbia* v. *Train*, *supra*, 521 F.2d at 979-980; *Brown* v. *EPA*, *supra*, 521 F.2d at 830.[48] Noting that the Administrator's interpretation of his powers under the Clean Air Act would raise serious constitutional questions, the courts of appeals held that the Act did not authorize the Administrator to direct the states to implement the fed-

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[48] For example, the court in *Brown* v. *EPA*, *supra*, 521 F.2d at 830 (footnotes omitted), pointed out that

> the Administrator's plan contemplated among other things, the reduction of gasoline sold within the Los Angeles, San Francisco, Sacramento Valley, San Joaquin Valley and San Diego Regions; the operation by the State of California of an inspection and maintenance program designed to reduce emissions from automobiles; limitations to be imposed by the State on the use of motorcycles; the institution by the State of an oxidizing catalyst retrofit program; control of dry cleaning solvent vapor losses; the imposition of surcharges on parking spaces; the development of a procedure of review and approval of construction or modification of parking facilities; the establishment by the State of a computer-aided carpool matching system; and the fixing by the State of certain preferential bus and carpool lanes. This plan specifically directed the State of California to undertake those tasks assigned to it, to report its compliance to the Agency, and, in the case of the inspection and maintenance program, to report the date by which the State would recommend any needed legislation and to submit "[a] signed statement from the Governor and State Treasurer identifying the sources and amounts of funds for the program" and the "text of needed legislation" if existing legislation does not authorize the funds which the program will require.

eral plans. In contrast to the EPA cases, the provisions of Section 210 and the Commission's regulations promulgated thereunder do not compel the states to regulate in an area where they have chosen to remain inactive (see page 35 and note 40, *supra*), or to enact legislation, promulgate regulations, or expend state funds. Moreover, unlike the EPA cases, where the states were directed to carry out a detailed regulatory program, the states have great flexibility under Section 210 to determine the means of compliance.

In sum, the provisions of PURPA, which impose only a minimal burden on the states in an area in which the federal government has concurrent responsibility, do not "impair the States' 'ability to function effectively in a federal system.'" *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 852, quoting from *Fry* v. *United States*, *supra*, 421 U.S. at 547 n.7.

B. Even Assuming That PURPA Works Some Interference with State Sovereignty, The Federal Interest It Advances Overrides State Interests

Even if all three of the prerequisites set out in *Virginia Surface Mining* are met, a Tenth Amendment challenge may still not succeed. In some situations, the nature of the federal interest advanced may be such that it justifies the subordination of state concerns to national purposes. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, *supra*, slip op. 21 n.29.

In *Fry* v. *United States*, *supra*, for example, this Court upheld the authority of Congress, in the Economic Stabilization Act of 1970, to impose a temporary freeze on the wages of state and local government employees. Subsequently, in *National League*

of Cities, the Court distinguished its previous holding in *Fry*, stressing that the statute at issue there was enacted in response to "an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall." 426 U.S. at 853. It noted that "[t]he means selected were carefully drafted so as not to interfere with the States' freedom beyond a very limited, specific period of time." *Ibid.* The Court observed in conclusion that "[t]he limits imposed upon the commerce power when Congress seeks to apply it to the States are not so inflexible as to preclude temporary enactments tailored to combat a national emergency." *Ibid.*; see also *id.* at 856 (Blackmun, J., concurring).

The provisions at issue here are clearly sustainable under the above reasoning. The nation's energy problem—both in 1978, when PURPA was enacted, and today—is certainly as serious a national problem as was the inflation that triggered the legislation involved in *Fry*. The legislative history of PURPA shows Congress' deep concern about the nation's increasing dependence on imported oil as a threat to our national interests (see page 20, *supra*). Moreover, Congress perceived the energy problem to be a pervasive and long-range one, requiring a response at the national level.[44] Finally, as we have shown, "[t]he means selected were carefully drafted so as not to interfere with the States' freedom" except in

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[44] See, *e.g.*, 123 Cong. Rec. 32444 (1977) (remarks of Sen. Percy); *id.* at 25894 (remarks of Rep. Ashley); *id.* at 25916-25917 (remarks of Rep. Ottinger); *id.* at 25941 (remarks of Rep. Boland).

a limited way. *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 853.[48]

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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[48] Even if certain of the challenged provisions violate the Tenth Amendment, the district court clearly erred in indiscriminately striking down all of Titles I and III and Section 210. It is well settled that "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *El Paso & Northeastern Ry.* v. *Gutierrez*, 215 U.S. 87, 96 (1909). See *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U.S. 210, 234 (1932); *United States* v. *Jackson*, 390 U.S. 570, 585-587 (1968); *Buckley* v. *Valeo*, 424 U.S. 1, 108-109 (1976). At the least, PURPA should be upheld to the extent that it imposes responsibilities directly upon utilities, rather than upon state regulatory authorities. See note 33, *supra*.

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